BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CAMILLE JOHNSON	)	
Claimant	)	
	)	
VS.	)	
	)	
ENCORE RECEIVABLE MANAGEMENT	)	
Respondent	)	Docket No. 1,045,739
	)	
AND	)	
	)	
FIDELITY & GUARANTY INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the October 16, 2009 preliminary hearing Order entered by Administrative Law Judge Marcia Yates Roberts.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant met her burden of proof that she sustained a compensable injury arising out of and in the course of her employment with respondent. The ALJ ordered respondent to provide treatment for claimant's bilateral carpal tunnel complaints through Dr. Prem Parmar.

The respondent has appealed this order alleging two separate arguments, which in its view warrant a reversal of the ALJ's Order. First, respondent contends claimant does not have carpal tunnel, but instead has right thumb tenosynovitis which is not work-related. Second, even if claimant has carpal tunnel, that condition is an occupational disease and her "last injurious exposure" was with a subsequent employer, after she left respondent's employ.

Claimant argues that the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds the ALJ's Order should be affirmed.

This Board Member finds that the ALJ's Order sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. This Board Member further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, this Board Member adopts the ALJ's findings and conclusions as her own as if specifically set forth herein.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[1]

Here, the ALJ concluded that claimant met her burden of establishing that she sustained an injury while employed by respondent which has left her with bilateral carpal tunnel complaints, with the right being more problematic. She noted that claimant continued to perform her repetitive work duties "until May 2009 when her pain increased to a level that she decided to seek medical treatment on her own."[2] The ALJ went on to note that Dr. Hamm diagnosed bilateral carpal tunnel and referred her on to Dr. Carabetta, who performed an EMG and diagnosed mild carpal tunnel on the right. Claimant says she notified her employer of her condition and the connection to work and was placed on a leave of absence but later was terminated.

This member of the Board has reviewed the evidence and concludes the ALJ's analysis is well reasoned and the Order should be affirmed. The nature of claimant's employment with respondent was repetitive and required her, for long periods throughout the day, to input information on a computer keyboard. The fact she would develop bilateral pain in her wrists, palms and fingers is understandable and confirmed by the medical reports of Dr. Carabetta and Dr. Hamm. Although respondent's physician, Dr. Hall, concluded that claimant does not have carpal tunnel, but instead is suffering from

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[1] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[2] ALJ Order (Oct. 16, 2009) at 2.

tenosynovitis of the right thumb due to her use of a Blackberry is some evidence that other activities could be contributing to her problem. But it does not rule out the diagnoses and explanation offered by the claimant and the other two physicians.

Moreover, this member of the Board also agrees that claimant's condition is not an occupational disease, as contemplated by K.S.A. 44-5a06. Respondent is attempting to shift its liability to a subsequent employer by asserting this condition is an "occupational disease" and governed by that portion of the Act that compels a finding that the last employer (purportedly Dress Barn) who exposes claimant to the risk is liable. The flaw in respondent's analysis is easily seen. Although repetitive injuries bear some similarities to an occupational disease as that term is used in K.S.A. 44-5a06, it is not an occupational disease. Such injuries are treated as an "accident" and are even afforded their own methodology of determining the "date of accident" as that can be problematic when the injury occurs over a long period of time, as here.[3]

As noted by the ALJ, claimant's symptoms manifested during her employment with this respondent. She sought out treatment in May 2009, while still employed by this respondent. She was diagnosed with bilateral carpal tunnel complaints, worse on the right than the left and that diagnosis was relayed to her employer, again while still employed. There is no evidence within this record that suggests that her work at the Dress Barn worsened her condition. Based upon her description of the job, it appears that this was an altogether different sort of job that involved far less repetitive work at least in terms of claimant's upper extremities. Nonetheless, after 4-5 weeks she was unable to continue. In light of this evidence, this Board Member finds the ALJ's analysis and her conclusions to be well reasoned and as such, the Order is affirmed in all respects.

The tone of respondent's brief does warrant some comment. Respondent spends a great deal of time on the fact that claimant failed to disclose her short-lived employment at Dress Barn during her deposition. It appears from the record that her subsequent employment came to light in the preliminary hearing. Respondent's brief makes all sorts of assertions that this failure is "false and misleading"[4], that claimant "thwarted the search for the relevant truth" thus causing "unfair surprise and prejudice"[5], and deprived respondent of the opportunity to provide Dr. Hall or Dr. Parmar with her subsequent employment duties (by failing to tell respondent of her job with Dress Barn)[6]. Respondent

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[3] K.S.A. 44-508(d).

[4] Respondent's Brief at 3 (filed Nov. 6, 2009).

[5] *Id.* at 6.

[6] *Id.* at 7.

suggests that claimant should be subjected to sanctions and a finding of fraud and abuse *and* that the Board should deny benefits altogether.[7]

While it is indeed unfortunate that claimant failed to fully disclose her post-injury employment during her deposition, her testimony at the preliminary hearing noted this discrepancy. The ALJ could no doubt take that into consideration of the claim. More importantly, respondent did not ask for additional time to explore this subsequent employment so that those facts could be presented to the physicians for the purpose of ascertaining what, if any, effect this had on their opinions. Simply put, respondent cannot sit back and feign righteous indignation at claimant's lack of disclosure without taking some steps to minimize the impact to its case. And in any event, respondent fails to offer any statutory authority for the result it advocates.

In the future, respondent would be well advised to temper its comments and use a more professional tone in its briefs, saving the rhetoric for those instances where it is warranted.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[8] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Marcia Yates Roberts dated October 16, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Joshua P. Perkins, Attorney for Claimant
Thomas G. Munsell, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge

[7] *Id.* at 8.

[8] K.S.A. 44-534a.